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No. 88-1182, 88-6651

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,
Petitioner,

v.

JACQUELINE BOUKNIGHT,
Respondent.

MAURICE M.,
Petitioner,

v.

JACQUELINE BOUKNIGHT,
Respondent.

On Writs of Certiorari to the Maryland Court of Appeals

BRIEF OF THE U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does a court order directing a parent to produce her previously abused infant son compel incriminating testimony in violation of the parent's Fifth Amendment privilege against self-incrimination?

2. Even if the Fifth Amendment privilege is implicated by a court order to produce a child, is the privilege overcome by the important societal interest in protecting children in jeopardy of serious injury?

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues affecting state and local governments.

At stake in this case is the power of a state or local government to protect abused children. In August 1987 the Circuit Court for Baltimore City, Division of Juvenile Causes, declared Maurice M., the infant son of respondent Jacqueline Bouknight, to be a Child in Need of Assistance and subject to protective supervision by petitioner Baltimore City Department of Social Services ("DSS" or "the State"). Respondent, after stipulating to the order for protective supervision, defied it by failing to cooperate with DSS.

Upon a petition from the State, which had been unable to observe Maurice for over seven months, the court ordered respondent to produce the child, and, when she refused to do so, found her in contempt. The court rejected respondent's claim that the Fifth Amendment privilege against self-incrimination justified her refusal to produce Maurice or to disclose his whereabouts. The Maryland Court of Appeals vacated the lower court's judgment, and this Court stayed the Court of Appeals' order pending resolution of this appeal.

Amici's concern is that sustaining this Fifth Amendment claim would, in many cases, make it virtually impossible for government social service agencies to determine whether a child is being abused, and, if so, to prevent such abuse. In addition, recognition of the Fifth Amendment claim in this context would necessarily make state and local government agencies reluctant to return children that have been placed in the custody of the State to their natural parents. To uphold respondent's claim thus would not only jeopardize children's health and safety, but also frustrate realization of the basic values inherent in familial relations.

The facts in *DeShaney v. Winnebago County Dep't of Social Services*, 109 S. Ct. 998 (1989), highlighted the difficulties experienced by state and local government agencies in reconciling the custody rights of a child's natural parents with the duty to protect the child from

abuse. The present case illustrates the effort of one State to prevent injuries to children of the type involved in *DeShaney*. Such efforts are stymied if the State cannot determine whether the child is safe or needs protection. The decision of the Maryland Court of Appeals in this case, by depriving the State of its power to compel production of a child, severely impairs the State's ability to fulfill its *parens patriae* obligation to protect children from abuse.

To uphold the Fifth Amendment claim in this case is especially egregious in view of respondent's agreement that the State exercise protective supervision over her child. Such agreements are unenforceable if the State cannot compel production of the child to determine whether he has been the victim of abuse or neglect. The decision below, by effectively inviting parental defiance of such an agreement, eliminates its usefulness as an alternative to the extremes of either abandoning children to possibly abusive parents or committing the children to state custody.

Amici submit that the judgment of the Court of Appeals is wrong. Because this Court's decision will have a direct effect on the ability of state and local governments to protect the welfare of children, a matter of outstanding importance to *amici* and their members, they submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT

After being hospitalized for multiple fractures at the age of less than four months, Maurice M. was discharged on February 10, 1987, to the custody of the State. Pursuant to an Order of Protective Supervision entered on August 18, 1987, the court declared Maurice a Child in Need of Assistance and placed him in the custody of his

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[1] The parties' letters of consent, pursuant to Rule 36 of the Rules of the Court, have been filed with the Clerk.

mother, respondent Jacqueline Bouknight, subject to the supervision of the Baltimore City Department of Social Services ("DSS" or "the State").

On the ground that respondent had failed to cooperate with DSS under the terms of the order of protective supervision, DSS in April 1988 filed a motion to hold respondent in contempt. At a hearing on April 20, 1988, at which respondent failed to appear, the court issued a warrant for her arrest and an order to show cause why she should not be held in contempt, and announced that she would be jailed if she failed to produce Maurice.

Upon her arrest on April 27, 1988, respondent was brought before the court and questioned about the whereabouts of Maurice. She stated that the child was with her sister in Dallas, Texas; pending verification of that information, the court ordered that she be held in jail. When, on April 28, 1988, the information proved incorrect, the court found respondent in contempt and ordered that she remain in jail until purged of her contempt. The court made it clear that the production of Maurice, by any means, would serve to purge the contempt.

At a subsequent hearing on May 18, 1988, respondent's counsel raised the claim that for respondent to purge herself of contempt she would be compelled, in violation of the Fifth Amendment, to incriminate herself. The court on May 26, 1988, after considering the parties' written memoranda and oral arguments on the Fifth Amendment claim, found it meritless because respondent need not testify to purge herself of contempt. The court explained that any manner of production of Maurice—either a means involving respondent or one wholly independent of any action on her part—would serve for such purgation.

The Maryland Court of Appeals reviewed the case on an expedited basis. It held on December 19, 1988, that

the contempt order violated respondent's Fifth Amendment privilege against self-incrimination and ordered her release from prison. The court refused to stay its judgment pending potential review in this Court.

This Court granted a stay of the Court of Appeals' judgment and, on April 3, 1989, agreed to hear the case. Almost one year had elapsed since the State first sought judicial intervention to locate Maurice.

SUMMARY OF ARGUMENT

This case threatens a critical state interest: the protection of an abused child. Against that interest respondent claims the right, pursuant to the Fifth Amendment, to withhold information without which the State cannot possibly help two-year-old Maurice. Respondent's asserted Fifth Amendment privilege cannot be credited under the circumstances of this case. Her interest in avoiding any possibility of self-incrimination simply does not outweigh the State's interest and its obligation to protect Maurice.

The Fifth Amendment does not grant an absolute privilege against self-incrimination. Determining whether the privilege precludes the government from requiring certain disclosures necessarily involves balancing the public need for the disclosures against the risk that the disclosure requirement will force those subject to it to incriminate themselves.

This Court in *California v. Byers*, 402 U.S. 424 (1971) (plurality opinion), articulated a two-part test for evaluating the acceptability of a disclosure requirement that presents some risk of self-incrimination: if (1) the purpose of the requirement is unrelated to criminal law enforcement, and (2) the persons subject to the requirement are not a "highly selective group inherently suspect of criminal activities" (*id.* at 430) (citation omitted), the argument that the Fifth Amendment forbids the re-

quirement is weakened. In such cases, a strong public need for information will justify a government demand for disclosure of the information.

The challenge to the order for the production of Maurice, under the two-part test of *Byers*, presents a weak argument for Fifth Amendment protection. First, the purpose of the order has nothing to do with criminal law enforcement: it was issued pursuant to a civil law, Maryland's Juvenile Causes Act, in order to ascertain and, if necessary, to protect the child's health and safety. Second, the persons potentially subject to such a production requirement include all parents, guardians, and custodians of children for whom the State may perceive a need to act to ensure proper "care, protection, and wholesome mental and physical development." Md. Cts. & Jud. Proc. Code Ann. § 3-802(a)(1) (1984). Only a small minority of this group would ever be suspected of criminal child abuse.

Opposing respondent's weak self-incrimination claim is the State's compelling interest in protecting Maurice. The State in this case, as in any case involving a child subject to its jurisdiction, has a *parens patriae* obligation to provide necessary assistance to the child. The factual history here strongly indicates that Maurice requires state assistance; due to his lack of such assistance for more than a year at the time of the filing of this brief, the current need to ascertain his condition is critical.

This Court has recognized that the State's *parens patriae* duty to protect the best interests of a child must overcome parents' constitutional claims in a variety of contexts. Thus the Court has rejected parental claims that the First Amendment bars state intervention to protect the interests of children. The state courts have rejected both First and Fifth Amendment claims. Respondent's claim should similarly be rejected.

Whatever privilege against self-incrimination respondent may claim to justify her refusal to produce her son, that privilege cannot, in a society that recognizes its obligation to protect its children, permit her to prevent the government from coming to the aid of a helpless, previously abused child who may be in physical jeopardy. Neither the Fifth Amendment nor this Court's decisions implementing that Amendment require such a repugnant result.

ARGUMENT

ANY CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION IMPLICATED HERE IS OUTWEIGHED BY THE STATE'S INTEREST IN PROTECTING CHILDREN THROUGH CIVIL PROCEEDINGS.

The Fifth Amendment privilege against self-incrimination (made applicable to the States through the Fourteenth Amendment) is not absolute.[2] *California v. Byers*, 402 U.S. 424 (1971) (plurality opinion); *see id.* at 452 (Harlan, J., concurring in the judgment). Determining the proper application of the privilege requires "balancing the public need [for disclosures] on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly." *Id.* at 427 (plurality opinion).[3] In this case, the individual claim to

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[2] *Amici* support petitioners' position that the Fifth Amendment is not implicated in this case because the contempt order at issue does not require action that is testimonial in nature. To avoid duplicating petitioners' arguments, *amici* focus on the second issue presented by this case: assuming that a testimonial response is necessary to determine the location of the child, is the Fifth Amendment a bar to the State's ability to obtain that response and thus to protect the child? Society's interest in finding and protecting the child would, of course, be equally strong if the contempt order did in fact require testimonial action.

[3] Justice Harlan, who concurred in the judgment, also agreed that the public interests involved are to be considered in determining whether the Fifth Amendment bars requiring disclosure. 402 U.S. at 451-52.

Fifth Amendment protection is weak, and the public need for disclosure is strong.

A. The Fifth Amendment Claim Is Weak.

Pursuant to the Self-Incrimination Clause of the Fifth Amendment, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." This Clause has been interpreted to grant an individual the privilege to withhold testimony in a variety of proceedings—civil or criminal, administrative or judicial, investigatory or adjudicatory—when the individual reasonably believes that the testimony could be used in a criminal prosecution or could lead to other evidence that might be so used. *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972). To invoke the privilege the claimant must be confronted by "substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." *Marchetti v. United States*, 390 U.S. 39, 53 (1968).

The fact that information may constitute incriminating evidence is not itself enough to preclude requiring its disclosure in every case. As this Court recognized in *California v. Byers*, there are situations in which the possibility of criminal prosecution based on information sought by the government may be very real, yet insufficient to defeat the strong policies that favor disclosure of the information. *See* 402 U.S. at 428 (plurality opinion); *id.* at 451-52 (Harlan, J., concurring in the judgment). When a disclosure requirement is (1) pursuant to a regulatory scheme the purpose of which is civil in nature, and (2) not directed at a "'highly selective group inherently suspect of criminal activities'" (*id.* at 430 (plurality opinion), quoting *Albertson v. SACB*, 382 U.S. 70, 79 (1965)), the risk of self-incrimination is so diminished that the requirement cannot be said to present a cognizable violation of the Fifth Amendment. 402 U.S. at 430 (plurality opinion). Both criteria are satisfied in this case.

1. The purpose of the State's order for production of the child is noncriminal in nature: it is to protect the health and safety of a child in need of assistance.

The Baltimore Circuit Court ordered that respondent produce Maurice in order to ensure that the child was safe.[4] When the court issued a warrant for respondent's arrest, it did so solely for this purpose. As the court explained, "we are not picking her up for purposes of punishing her. We are picking her up in an attempt to find the child." J.A. 53. The court further explained at that time that if respondent failed to produce Maurice, it would hold her in contempt of court because "[w]hat this court has to look at is what is in the best interest of this child. And quite frankly, that child is paramount on this court's mind." J.A. 54.

After respondent refused to produce Maurice, the court did hold her in contempt. The court took this action in accordance with Maryland's Juvenile Causes Act, which provides that "[i]f a parent, guardian, or custodian fails to bring the child before the court when requested, the court may . . . proceed against the parent, guardian, or custodian for contempt." Md. Cts. & Jud. Proc. Code Ann. § 3-814(c) (1984). It is clear from the Juvenile Causes Act itself that the court's action was remedial, rather than punitive in nature. The relevant purposes of the Act are (*id.* § 3-802(a)):

> (1) To provide for the care, protection, and wholesome mental and physical development of children . . . and to provide for a program of treatment, training, and rehabilitation consistent with the child's best interests and the protection of the public interest;
>
> * * * *
>
> (3) To conserve and strengthen the child's family ties and to separate a child from his parents only

[4] Respondent is the only apparent source of information regarding the child's whereabouts. His father died in March 1988.

when necessary for his welfare or in the interest of public safety; [and]

* * * *

(5) To provide judicial procedures for carrying out the provisions of this subtitle.[5]

Maryland's Juvenile Causes Act is typical of the child abuse statutes adopted in every State and the District of Columbia. See Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 Minn. L. Rev. 723, 725 n.10 (1987) (citing statutes). The federal government has also recognized the importance of protecting children from abuse: the Child Abuse Prevention and Treatment and Adoption Reform Act, 42 U.S.C.A. § 5101 *et seq.*, enacted in 1974, provides funding for the States to be used in "developing, strengthening, and carrying out child abuse and neglect prevention and treatment programs." *Id.* § 5106a(a) (Supp. 1989). The primary purpose of the federal law, like the state child abuse statutes, is to ensure that children are protected from abuse through parental and custodial treatment and training.[6]

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[5] Section 3-802(a) identifies the other purposes of the Act as:

(2) To remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior; [and]

* * * *

(4) If necessary to remove a child from his home, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents.

[6] See S. Rep. No. 167, 95th Cong., 1st Sess. 59, *reprinted in* 1978 U.S. Code Cong. & Admin. News 557, 602 (statement of Arabella Martinez, Assistant Secretary for Human Development, Department of Health, Education, and Welfare). The federal statute conditions funding for state programs in part on the State's maintaining requirements for reporting of child abuse and procedures to ensure that "upon a finding of abuse or neglect, immediate steps shall be taken to protect the health and welfare of the abused or neglected child." 42 U.S.C.A. § 5106a(b)(2) (Supp. 1989). The federal law does *not* require the States to impose criminal sanctions on child abuse offenders.

In *Byers*, this Court found it significant that the reporting requirement alleged to violate the Self-Incrimination Clause was part of a statute that, while defining some criminal offenses, "is essentially regulatory, not criminal." 402 U.S. at 430 (plurality opinion).[7] The plurality noted that the requirement, part of the California Vehicle Code, "was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities arising from automobile accidents." *Ibid.* In this case, it is clear that the purpose of the order of production is similarly nonpunitive: it is to protect the health and welfare of Maurice. See, *e.g.*, J.A. 44-45 ("The Court: Where is the baby? Bring me the baby. If I see the baby is okay, fine. I am happy. But somebody has to protect that child. Based on what I have already heard, this child is in serious jeopardy."). As the court explained, some enforcement mechanism was required to provide such protection, and the order of production, coupled with the threat of civil contempt, was the sole mechanism available. See J.A. 55 ("The Court: If [respondent] fails to produce the child, then I will order her held without bail in Baltimore City Jail until the child is found. I don't think I have much choice. If someone can give me some other reasonable alternative, I will be glad to consider it.").

It is even clearer here than in *Byers* that the requirement at issue has an extremely important noncriminal justification. The public purpose of the reporting requirement in *Byers* was to promote the satisfaction of civil liabilities arising from automobile accidents; here, the

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[7] Justice Harlan's concurrence also focused in its analysis on "the noncriminal governmental purpose in securing the information." 402 U.S. at 458.

order of production is designed to protect—perhaps to save—a child's life. There can be no fair suggestion that this order, and the statute pursuant to which it was issued, does not have a strong noncriminal purpose.

2. *Orders to produce a child are not directed at a highly selective group inherently suspect of criminal activities.*

Byers also requires examination of the nature of the group subject to the disclosure requirement. If the requirement is directed at a "highly selective group inherently suspect of criminal activities," then the requirement may be said to create an intolerable risk of self-incrimination. 402 U.S. at 430 (plurality opinion) (citation omitted). If, however, the requirement is imposed on—and in fact affects—a group of which only a minority risks self-incrimination through compliance, then the requirement likely does not violate the Fifth Amendment. The fact that *some* persons may undergo a risk of self-incrimination as a result of the requirement is not dispositive: the applicability of the privilege depends on how serious the risk of incrimination created by the requirement is *in general*. Thus in *Byers*, the fact that California's Vehicle Code was directed at all drivers in California who are involved in automobile accidents, and that most accidents occur without creating criminal liability, indicated that the Code's disclosure requirement posed, in general, a low risk of self-incrimination. *See id.* at 431.

The order of production in this case implements the statutory requirement that a parent, guardian, or custodian must, on pain of contempt, bring a child before the court when requested. See Md. Cts. & Jud. Proc. Code Ann. § 3-814(c).[8] That statutory requirement is

[8] The case, however, would not be different if the order were based on the court's inherent equitable power. Such an order, like one based on statutory authority, would be utilized in the majority

not directed at "a highly selective group inherently suspect of criminal activities." In the vast majority of cases where the State requires production of a child there is no suspicion of criminal activity: although the State may suspect that the child has been neglected or abused, in only a small minority of cases does it suspect that such neglect or abuse has been so severe as to trigger criminal liability. In fact, less than ten percent of all child abuse cases go forward to prosecution. See Whitcomb, Shapiro & Stellwager, *When the Victim Is a Child: Issues for Judges and Prosecutors* at i (National Institute of Justice 1985).

It is not material whether in this particular case there is a suspicion of criminal liability. Just as the reporting requirement in *Byers* would be imposed on a group that would include some criminal suspects (and indeed, Byers himself raised the Fifth Amendment claim after being charged with violating both the reporting requirement and a related criminal provision), so too some parents ordered to produce their children will subsequently be charged with criminal child abuse. That does not mean, however, that either demand is directed at a "highly selective group inherently suspect of criminal activities."

Decisions barring governmental orders for disclosures because of a Fifth Amendment privilege are distinguishable on exactly this ground. *See, e.g., Leary v. United States*, 395 U.S. 6 (1969) (requirement to report unregistered transfers of marijuana violates the Fifth Amendment because possession of marijuana is a crime); *Haynes v. United States*, 390 U.S. 85 (1968) (requirement to register firearms in one's possession violates the Fifth Amendment because possession of unregistered firearms is a federal offense); *Grosso v. United States*,

of cases to require production of children by persons who would not be inherently suspect of criminal behavior.

390 U.S. 62 (1968) (requirement that persons engaged in gambling disclose records of their gambling activities violates the Fifth Amendment because gambling is a crime); *Marchetti v. United States*, 390 U.S. 39 (1968) (same); *Albertson v. SACB*, 382 U.S. 70 (1965) (registration requirement for Communist Party members violates the Fifth Amendment because Communist Party membership may constitute a federal offense).

Since *Byers*, lower courts have used its two-part test to find various reporting requirements valid under the Fifth Amendment. *See, e.g., United States v. Flores*, 753 F.2d 1499 (9th Cir. 1985) (upholding the mandatory notification to carriers that firearms are being shipped to an unlicensed person); *United States v. Wilson*, 721 F.2d 967 (4th Cir. 1983) (same); *United States v. Des Jardins*, 747 F.2d 499 (9th Cir. 1984) (upholding mandatory disclosure of the transfer of more than $5,000 into or out of the United States); *United States v. Dichne*, 612 F.2d 632 (2d Cir. 1979), *cert. denied*, 445 U.S. 928 (1980) (same); *see also Pauldino v. United States*, 500 F.2d 1369 (10th Cir. 1974) (upholding use of income tax return stating that defendant's occupation was gambling as evidence of unlawful gambling-related activity).

The disclosure requirements in those cases were at least as likely to apply selectively to criminal suspects as is the order for production of a child. Moreover, the public purpose underlying those requirements was much less critical than is the purpose of the order in this case. Clearly, the court ordered that respondent produce Maurice to protect the child's health and safety, not to obtain information concerning possible criminal activity. In light of that critical purpose, and the fact that such orders are not selectively directed at criminal suspects, respondent's claim to the privilege against self-incrimination is extremely weak.

B. The *Parens Patriae* Interest Of The State Is Sufficiently Strong To Override Constitutional Claims Of Parents Or Custodians.

This Court has long recognized the State's paramount *parens patriae* interest in the welfare of children. As the Court stated in *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944): "It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens." Mindful of this interest, the Court has often determined that the best interests of the child override constitutional claims of parents or custodians no less worthy of protection in our constitutional scheme than the Fifth Amendment.

Prince itself is compelling authority for the proposition that the State's interest in Maurice's welfare must overcome any Fifth Amendment privilege that respondent may hold. In *Prince*, a Massachusetts statute prohibited sales of newspapers and magazines by minors in public places. Prince, a member of the Jehovah's Witnesses, was convicted for violation of the statute as a result of having permitted her minor niece, of whom she was custodian, to sell religious literature on the streets.

Prince urged that her conviction violated the First Amendment guarantee of freedom of religion. This Court forcefully disagreed:

> Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the com-

> munity or the child to communicable disease or the latter to ill health or death.

321 U.S. at 166-67 (citations omitted).

Prince stands as authority for broader state intervention than is necessary to overturn the decision of the Maryland Court of Appeals in the instant case. The child in *Prince* was in no apparent danger of physical harm, whereas Maurice may well be in such danger.

The Court undertook a similar balancing of parents' constitutional rights against the *parens patriae* interest of the State in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). There, the Court considered the right of the State to compel children's school attendance beyond the eighth grade over the religious objections of Amish parents. Although ultimately holding that the free exercise claim was of sufficient force to overcome that state interest, this Court was careful to narrow its holding (*id.* at 233-34):

> To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens. . . . The record strongly indicates that accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child . . . .

Finally, this Court's *per curiam* affirmance in *Jehovah's Witnesses v. King County Hospital*, 390 U.S. 598 (1968), is further evidence of the Court's adherence to the *Prince* standard and is clearly significant here because of the balance struck between the asserted constitutional right and the State's *parens patriae* interest in protecting the physical safety of the child. In that case, this Court was presented with a free exercise challenge to a state statute which, as applied to plaintiffs, permitted the

State to overrule parental objections and administer blood transfusions to children in need of such treatment. This Court, relying upon *Prince*, upheld the constitutionality of the state statute as applied, thus reaffirming the right of the State to intervene to protect children when their health or safety is threatened.[9]

In other contexts as well, this Court has noted the importance of "the State's right—indeed, duty—to protect minor children." *Stanley v. Illinois*, 405 U.S. 645, 649 (1972).[10] That right and duty is so paramount that it forms the basis for judicial severance of the parental bond, a bond that itself is deemed "essential" (*Meyer v.*

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[9] The state courts likewise have authorized medical treatment for children despite parental objections based on the free exercise of religion. *See, e.g., In re Ivey*, 319 So. 2d 53 (Fla. App. 1975); *In re Sampson*, 29 N.Y.2d 900, 278 N.E.2d 918, 328 N.Y.S.2d 686 (1972); *State v. Perricone*, 37 N.J. 463, 181 A.2d 751, *cert. denied*, 371 U.S. 890 (1962); *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769, *cert. denied*, 344 U.S. 824 (1952).

These cases cannot be distinguished on the ground that the Fifth Amendment right is somehow stronger than the First Amendment right because the claimant of the Fifth Amendment privilege may incur a criminal penalty if the privilege is denied. In *Prince*, the constitutional claim was made on an appeal from a state conviction; the failure of the constitutional argument there thus resulted in the affirmance of the conviction. Indeed, religious beliefs generally have been rejected as a defense in criminal prosecutions involving failure to provide medical attention for a child. *See Commonwealth v. Barnhart*, 345 Pa. Super. 10, 497 A.2d 616 (1985), *app. denied*, 517 Pa. 620, 538 A.2d 874, *cert. denied*, 109 S.Ct. 55 (1988); *Craig v. State*, 220 Md. 590, 155 A.2d 684 (1959).

[10] *See also New York v. Ferber*, 458 U.S. 747, 756-58 (1982) (State's "compelling" interest in "safeguarding the physical and psychological well-being of a minor" is a justification for statute regulating child pornography); *FCC v. Pacifica Foundation*, 438 U.S. 726, 749-50 (1978) (government interest in "well-being of its youth" justifies regulation of radio broadcast that is indecent but not obscene); *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding state statute criminalizing the sale of certain magazines to minors).

Nebraska, 262 U.S. 390, 399 (1923)) and one of the "basic civil rights of man" (*Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)); and which is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment and by the Ninth Amendment. *Stanley*, 405 U.S. at 651.

The Maryland Court of Appeals is apparently the first court to have faced the question whether an order to produce a child in need of assistance violates the privilege against self-incrimination. Other state courts, however, have dealt with self-incrimination challenges in the context of child abuse proceedings, and have in each case determined that the interests of the child weigh heavily against any asserted Fifth Amendment claim of the parent or guardian.

For example, the state courts have apparently unanimously concluded that, when a child's interests are at stake, the Fifth Amendment does not preclude conditioning a parent's right to retain custody of the child on the parent's disclosing incriminating information. Thus the State may require parents to undergo therapeutic treatment or psychological examinations or else forfeit the right to keep their children. *See, e.g., In re H.R.K.*, 433 N.W.2d 46 (Iowa App. 1988) (State may condition parental custody on the completion of a sexual abuse treatment program in which parents must admit that sexual abuse of a child occurred); *In re J.W. & A.W.*, 415 N.W.2d 879 (Minn. 1987) (State may condition parental custody on the results of a psychological evaluation likely to be favorable only if the parents reveal incriminating information); *accord In re S.A.V. & S.M.V.*, 392 N.W.2d 260 (Minn. App. 1986); *In re Johnson*, 142 Mich. App. 764, 371 N.W.2d 446 (1985); *In re Fay G.*, 120 N.H. 153, 412 A.2d 1012 (1980).

The State also may create judicial presumptions of parental responsibility for the condition of a child, and

those presumptions will control the outcome of a custody determination if the parent refuses to disclose information regarding that condition. *See, e.g., In re Simpson*, 126 Misc. 2d 162, 481 N.Y.S.2d 293 (Fam. Ct. 1984); *In re Fred S.*, 66 Misc. 2d 683, 322 N.Y.S.2d 170 (Fam. Ct. 1971).

In addition, the state courts have found the best interests of the child dispositive in resolving Fifth Amendment claims regarding the sequence of parallel criminal and civil child abuse proceedings. Parents who have been named simultaneously as defendants in criminal and civil child abuse actions have argued that to proceed with the civil case while the criminal action is pending violates their privilege against self-incrimination because they cannot present an adequate civil defense without disclosing incriminating information. The courts have repeatedly refused to postpone civil actions on this ground, finding that "[e]xpedition is important because it is only if and after the allegations of abuse are sustained at a fact-finding trial that the Family Court has authority to determine the best plan for the child's long-term care. However, criminal charges based on acts of alleged child abuse generally pend for inordinate periods." *In re Vance A.*, 105 Misc. 2d 254, 432 N.Y.S.2d 137, 142 (Fam. Ct. 1980) (citation omitted); *accord In re Melissa M.*, 127 N.H. 710, 506 A.2d 324 (1986); *In re Germaine B.*, 86 A.D.2d 847, 447 N.Y.S.2d 448 (1st Dept. 1982).

Even in a criminal child abuse proceeding, the State's obligation to protect children plays a role in determining the degree of protection the Fifth Amendment will provide a parent. In *People v. Salinas*, 131 Cal. App. 3d 925, 182 Cal. Rptr. 683 (5th Dist. 1982), for example, the court found it necessary to consider the best interests of the child in order to resolve whether the mother's Fifth Amendment rights had been violated by the failure of an interrogator to provide her with *Miranda* warnings. Among other reasons, the fact that the allegedly

incriminating information the mother disclosed was necessary to provide emergency care to her child led the court to reject the mother's Fifth Amendment claim. The court concluded that:

> In balancing the interests of the child's well being, particularly in an emergency situation when a life is at stake, versus the need for protecting the alleged abuser's right against self-incrimination, we believe there is no question that the former interest outweighs the latter. . . . "Any other policy would reflect an indifference to human life."

182 Cal. Rptr. at 692 (quoting *People v. Riddle*, 83 Cal. App. 3d 563, 148 Cal. Rptr. 170, 179 (2d Dist. 1978), *cert. denied*, 440 U.S. 937 (1979)).

Whether or not the situation of two-year-old Maurice constitutes a medical emergency is, of course, unknown, and will not be known until he is found. The government's interest in finding Maurice is therefore increasingly critical. Surely that interest outweighs any Fifth Amendment right his mother may assert to refuse to produce him.[11]

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[11] This case should not be resolved by requiring the State to grant respondent immunity from the use of her testimony for criminal prosecution. To require States to grant use immunity (assuming they can do so) to parents in exchange for information about their children's whereabouts would create serious impediments to the State's ability to protect children.

Because of the difficulty in proving that independently obtained evidence was derived from sources not covered by the grant of immunity, use immunity can, as this Court recognized in *Braswell v. United States*, 108 S. Ct. 2284, 2294-95 (1988), make successful prosecution difficult if not impossible. The decision to grant such immunity should therefore be made only after careful consideration, by a prosecutor who is fully aware of all of the facts. This decision cannot, in the majority of child abuse or neglect cases, appropriately be made by the attorney representing the government in the civil family court proceeding. Thus a requirement of use immunity would make it necessary for civil and criminal attorneys to coordinate to reach decisions on when to grant immunity, which would impose a substantial burden on already overworked family court lawyers, case workers, and prosecutors. In addition, it would inevitably, and sometimes dangerously, prolong the process of obtaining information about abused children. Most important, the possibility of obtaining immunity would encourage parents to withhold information about their children's whereabouts, and significantly undermine the threat of prosecution as a deterrent to child abuse.

CONCLUSION

For the foregoing reasons, the judgment of the Maryland Court of Appeals should be reversed.

Respectfully submitted,

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